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10 **IN THE UNITED STATES DISTRICT COURT**
 11 **FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

13 ENOCH ADAMS, JR., LEROY ADAMS,
 14 ANDREW KOENIG, JERRY NORTON
 DAVID SWAN and JOSEPH SWAN,

15 Plaintiffs,

16 v.

17 TECK COMINCO ALASKA INCORPORATED
 18 Defendant.

19 NANA REGIONAL CORPORATION and
 20 NORTHWEST ARCTIC BOROUGH,

21 Intervenors-Defendants.

Case No. A04-49 (JWS)

DECLARATION OF LUKE COLE
 IN SUPPORT OF REPLY IN
 SUPPORT OF
 MOTION IN
LIMINE TO EXCLUDE
 DOCUMENTS NOT
 TIMELY DISCLOSED
 (Fed. R. Civ. Proc. 26 and 37)

23 I, Luke Cole, declare:

24 1. I am over 18 years of age and not a party to this action. I am lead counsel for
 25 plaintiffs.
 26 2. Several of the documents with Bates numbers above 50582 were disclosed to Adams
 27 during the week of January 14, including the October 2007 DMR which was sent by Teck
 28 Cominco to the EPA on November 12 but withheld from Adams until two months later.

DECLARATION OF LUKE COLE IN SUPPORT OF
 OBJECTIONS TO EXHIBITS AND MOTION
 IN LIMINE TO EXCLUDE DOCUMENTS

1 3. Teck Cominco's failure to disclose the 11 lab reports precluded critical parts of
2 Adams's case preparation such as discovery. The lab reports at issue are indisputably "of the sort
3 previously produced in this litigation" as envisaged by the Court's August 2007 discovery order.
4 Ten of the 11 documents are from 2000-2002, and the 11th is from 2004.

5 4. I was counsel for plaintiffs in the case *Kivalina Relocation Planning Commission v.*
6 *Teck Cominco Alaska, Inc.* The documentary evidence from that case that was allowed to be used
7 in this case is specified in the stipulation, at Docket , is narrowly drawn to include only the
8 written discovery by KRPC and Teck Cominco enumerated in the stipulation. A true and correct
9 copy of that stipulation, filed as Docket 75, is attached as Exhibit 1. It does not include
10 documents attached to motions in the KRPC case such as Exhibits 1648, 1649 and 1651.

11 5. Adams is directly prejudiced by the failure of Teck Cominco to earlier produce the
12 biomonitoring document, in five distinct ways. First, the failure to disclose the document prior to
13 January 2008 – although it has been available, on its face, from June 2007 – precluded Adams
14 from petitioning the Court to do written discovery of Teck Cominco about the study, such as
15 requests for admission, requests for production, or interrogatories to discover the background,
16 reason for adoption, relevance or status of the proffered documents. Second, the failure to
17 disclose the study earlier precluded Adams from deposing any witness about its contents, history,
18 status and relevance, or lack thereof, to this case. Third, the failure to disclose the study before
19 January 23 deadline for filing exhibit lists precluded Adams from listing any documents it might
20 have discovered from Teck Cominco that would contradict, supplement, explain or undercut the
21 study. Fourth, the failure to disclose the June 2007 study until late January 2008, after the
22 deadline for filing expert reports, precluded Adams from soliciting its expert input on the study
23 and making that input part of its experts' final reports, timely served on January 18, 2008.
24 Finally, the failure to disclose the study until after the filing of witness lists precluded Adams
25 from securing and timely disclosing any fact witness(es) it might have chosen to use to amplify,
26 contradict or otherwise comment on the study. In the short time before trial, none of these harms
27 are now curable.

28 6. Adams is prejudiced in a number of ways by not seeing the photographic exhibits until

1 this late date, and by having them admitted even as demonstrative evidence. For the most part
2 the photographs do not indicate the date on which they were taken, and none reveal who took the
3 photo. The date is critical, as is the time of the photograph, in determining whether the
4 photograph accurately reflects the actual conditions at the particular location or was the result of
5 the mine “cleaning up its act” for the purposes of photographic documentation. For example, had
6 Adams had access to the photographs earlier, it could have propounded written discovery to
7 determine the dates, times and locations of the photographs, and then correlated that with the
8 actual discharge of the mine on that date and time. It could also have deposed the photographer
9 (or, more likely, asked the photographer in depositions it was already taking of that Teck
10 Cominco employee) to find out the conditions under which it was taken and whether or not the
11 mine was discharging at the time.

12 7. As is, a photograph offered as “demonstrative” or “illustrative” of what Outfall 001
13 looks like, for example, might be a photograph of Outfall 001 operating at 0%, 10%, 50% or
14 150% of capacity – without the ability to propound discovery to answer these questions, Adams
15 is prejudiced in having the Court consider them. The photograph of a seemingly placid stream
16 might be the result of the mine having ceased its discharge for the day, or may actually be a
17 photograph of a day of violation of the mine’s TDS, cyanide or whole effluent toxicity permit
18 limits – but Adams, and this Court, cannot know because the photographs were not produced in
19 time for Adams to determine this critical background information.

20 8. A true and correct copy of the Supplemental Report of Robert Fuhrman is attached as
21 Exhibit 2. While the actual charts that Teck Cominco offers as Exhibits 1667, 1669 and 1670
22 were produced at the same time as the Fuhrman report, there is no reference to them in that report
23 that I have been able to find.

24 9. With less than six days to prepare its objections to Teck Cominco’s exhibits between
25 physically receiving them on January 23 to filing its motion in limine on January 29, 2008,
26 Adams relied in part on the short-hand of the presence or absence of Bates-stamp numbers to
27 determine which of Teck Cominco’s more than 800 exhibits had been timely disclosed. The lack
28 of a Bates-stamp was *prima facie* evidence that the document had not been previously disclosed,

1 and without a Bates-stamp to refer to, it was impossible to locate the exhibits Adams objected to
2 among the more than 53,000 pages of discovery documents in this case.

3 I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th
4 day of February 2008 at San Francisco, California.

5
6
7 /S/ Luke Cole
Luke Cole

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9 CERTIFICATE OF SERVICE

10 I hereby certify that on the 12th day of February 2008, a true and correct copy of the foregoing Declaration of Luke Cole in
11 Support of Reply in Support of Objections to Exhibit List and Motion to Exclude Undisclosed Documents was served, via
12 electronic mail, on the below identified parties of record:

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/S/ Luke Cole
Luke Cole